

STATE OF VERMONT

In re) Fair Hearing No. 20,501
)
 Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) substantiating reports of abuse by the petitioner of a vulnerable adult. The issue is whether the Department has met its burden of proof by a preponderance of evidence. Inasmuch as both parties assert that rulings by the hearing officer on motions they have filed have affected the outcome in this matter, a detailed recitation of the procedural history is deemed necessary.

PROCEDURAL HISTORY

On May 26 and June 2, 2005 DAIL received separate reports alleging that the petitioner had abused D.F. by threatening her and intentionally striking her with his car. D.F. is a seventy-three-year-old woman who was reported to be a vulnerable adult due to the "infirmities of aging".

A year later, on May 24 and June 28, 2006 DAIL sent seemingly identical letters to the petitioner notifying him

that the Adult Protective Services Division was recommending to the Commissioner of that agency that his actions under investigation constituted abuse of a vulnerable adult under the pertinent statute.

At the petitioner's request a Commissioner's review hearing was scheduled on July 25, 2006. The petitioner did not appear at the hearing, but submitted several letters before that date. On August 11, 2006, the Commissioner notified the petitioner that he had substantiated the reports as abuse of a vulnerable adult. On September 7, 2006 the Board received an appeal by the petitioner of this decision.

The hearing officer held a telephone status conference with the petitioner and the Department's attorney on October 16, 2006. At that time the Department indicated that its witnesses would include the alleged victim and other "eyewitnesses". The petitioner requested information from the Department regarding the physical and mental status of the alleged victim, and indicated that he would probably be filing a motion to dismiss. The matter was continued to allow for this exchange of information.

Another telephone conference was held on November 13, 2006. The petitioner reiterated that he felt that the preliminary issue was whether the alleged victim met the

statutory definition of a vulnerable adult, and he asserted that the Department had not provided him with any information in this regard. In a Memorandum dated November 16, 2006, the hearing officer directed the Department, by December 29, 2006, to provide the petitioner and the Board with "a written summary of all its factual allegations in this matter". An in-person status conference was scheduled for January 9, 2007.

In response to the above directive, the Department submitted a letter dated December 22, 2006 that included the following:

The Department's evidence will include D.F.'s testimony as well as medical evidence from her personal physician regarding the extent and longevity of her physical disability and about the ways in which her physical impairment affects her mobility. The Department also may present evidence regarding the physical therapy that D.F. received as a result of her disability. [Name] provided some of that therapy. In addition, there may be at least one or two witnesses who will describe the services that have been provided to D.F. over the years, as well as at least one witness to the behavior by [petitioner] that led up to the alleged incident and that contributed to D.F.'s actions and reactions that day. The Department also may call other witnesses who were at the scene that day, including police officers and the son of [petitioner], who was present in the vehicle.

A status conference was held in Rutland on January 9, 2007. At that time the parties agreed to the following:

(1) the Department would provide a written statement of its evidence as to the alleged abuse itself by January 19, 2007; (2) the petitioner would file a pretrial motion by February 2, 2007 regarding a request for a preliminary ruling in his favor on the issue of the alleged victim's status as a "vulnerable adult", with the Department to respond before February 13; (3) telephone status conferences would be held on February 13 and 20 to resolve any remaining pre-hearing issues; and (4) the matter would be set for hearing on March 2, 2007.

On January 23, 2007 the Department sent the Board and the petitioner a letter informing the hearing officer that the Department had recently become aware that the "criminal proceeding" resulting from this same incident was still underway. The Department also requested that D.F., the alleged victim, be allowed to testify either out of the petitioner's presence in a room with a one-way mirror or in a large room with physical distance between herself and the petitioner.

At the status conference held on February 13, 2007 the parties confirmed that the criminal case against the petitioner was still pending. The hearing officer advised the parties of his unease in subjecting the petitioner, who

was preceding *pro se* in both his criminal trial and this matter, to the potential jeopardy of having testimony and evidence in this matter being used against him in a criminal trial. Both parties indicated that they did not oppose, but were not requesting, a continuance of the matter to allow the criminal matter to resolve before commencing the hearing in this matter. As a result, the hearing was continued and the matter was set for a status conference on March 19, 2007.

In terms of timeliness, the decision to continue this matter pending resolution of the criminal trial became significant. At the status conference on March 19, 2007 the parties informed the hearing officer that the criminal case was still pending. On April 11, 2007 the petitioner sent the Board and the Department a letter indicating that a second criminal trial against him had been commenced and that it would likely be "several more months" before they could be completed.

On April 13, 2007 the Department noted its objection to a "continuance for three months". The Department represented that it had been informed that the timing of criminal matters against the petitioner would probably be known within two or three weeks, and it requested that another status conference be scheduled. However, a subsequently scheduled status

conference on May 14, 2007 was continued when the parties reported in advance that they had no further information on the progress of the criminal cases.

A telephone status conference was held on June 18, 2007. At that time the parties reported no change in the status of the criminal trials against the petitioner. The petitioner requested that the hearing officer make a written ruling on his pending motions to dismiss based on the status of the alleged victim as a vulnerable adult and on constitutional grounds.

In a Memorandum dated July 2, 2007, the hearing officer made the following **Rulings on Pending Motions:**

1. The issue of whether the alleged victim in this matter meets the statutory definition of a "vulnerable adult" is a factual question that is part of the Department's burden of proof at the hearing. Inasmuch as the hearing is *de novo*, the Human Services Board has "jurisdiction" to consider this issue. 3 V.S.A. § 3091. Inasmuch as the hearing has not yet been held, any request by the petitioner for a *ruling* on this issue is premature.

2. Inasmuch as a hearing on the merits has not yet been held, consideration of any constitutional challenges to 33 V.S.A. § 6906 cannot now be deemed necessary and are, therefore, premature. See *Herald Assn. v. Ellison*, 138 Vt. 529, 533 (1980).

3. The matter is continued until the parties advise me that the pending criminal matter related to this incident is resolved. At that time I will schedule a status conference to discuss the scheduling and scope of the hearing. Consideration of any further motions or

arguments by the parties is deferred until the time of such status conference.

In a memorandum dated August 1, 2007 the hearing officer denied the petitioner's request to place the above rulings on the Board's agenda prior to a hearing.

The matter was continued for several months time, during which neither party reported any progress or resolution regarding the criminal matters pending against the petitioner.¹ Neither party filed an objection to the continuances of the matter throughout this period.

On July 29, 2008 the petitioner notified the Board and the Department that on July 25, 2008, following a trial he had been acquitted of all criminal charges pending against him.² On August 1, 2008 the Board mailed written notices to the parties that the hearing in this matter would be held on September 17, 2008.

On August 8, 2008 the petitioner sent a letter that included a representation that he had filed a "Summons and Complaint" to have the Rutland Superior Court "put a hold" on the HSB hearing, apparently to address the procedural and

¹A status conference scheduled for January 10, 2008 was cancelled when the petitioner reported in writing that there was no change in the status of the criminal matters.

²The petitioner had previously provided the Board with copies of a decision by the Vermont Supreme Court reversing a relief from abuse order against him stemming from the same incident.

constitutional rulings the hearing officer had declined to make in July 2007 prior to the hearing (see supra). On August 11, 2008, the hearing officer sent the parties the following memorandum:

In response to the petitioner's correspondence faxed to the Board on August 8, 2008, please note the following:

1. The Department shall have until August 22, 2008 to provide the petitioner and the Board with written notice containing a list of all witnesses it intends to call at the hearing, with a summary of each witness's expected testimony.

2. By the same date, the Department shall provide the petitioner and the Board with copies of all documents it intends to introduce or refer to at the hearing.

3. On or before September 5, 2007 the petitioner shall provide the Board and the Department with his own witness list that includes any request for subpoenas pursuant to Fair Hearing Rule 7. Subpoena requests shall include a brief summary of the testimony the petitioner expects to elicit from each witness.

4. A telephone status conference will be held on September 9, 2008 to address subpoenas and any other outstanding procedural issues. Refusal to participate in the status conference will be grounds for dismissal. The Board will mail separate notice of the time of the status conference. (Emphasis in the original.)

5. The petitioner's request for a continuance of the hearing scheduled for September 17, 2008 is denied. *Any subsequent request by either party for a continuance on any other grounds will be granted only upon a showing of substantial and unavoidable prejudice.* (Emphasis added.)

On August 22, 2008 the Department filed its list of witnesses and copies of documents it intended to introduce at the hearing. The Department's attorney concluded her submission with the following:

Because I was out of the office until this week, I have not had an opportunity to contact any of the potential Department witnesses and therefore I am not aware of their availability at this time. I hope to have that information by the status conference on September 9, 2008.

On September 2, 2008 the petitioner notified the Board and the Department that he would be the only witness for himself at the hearing.

A telephone status conference was held on September 9, 2008. The Department correctly represents that the following occurred: (1) the Department informed the petitioner and the hearing officer that it had not been able to make contact with any of the witnesses necessary for the fair hearing, although "efforts were being made"; (2) the hearing officer directed the parties to attend the hearing on September 17, and that the Department should appear with any witnesses it was able to have available; and (3) the hearing officer deferred any ruling as to the availability of the Department's witnesses to the time of the hearing.³

³ See Department's Motion to Continue dated October 3, 2008.

The hearing was held in Rutland on September 17, 2008. The petitioner was present, but the Department appeared with only two of its eleven listed witnesses. One of the Department's witnesses was its investigator of the incident; the other was an EMT who had treated D.F. at the scene a few minutes after the alleged incident occurred. D.F., the alleged victim, did not appear. No other eyewitness to the incident itself testified for the Department (see *infra*).

At the hearing the Department moved for a continuance to schedule another date for hearing to allow it to introduce the testimony of its other witnesses, including D.F. The hearing officer directed the Department to present its case with the witnesses present and to file any motion to continue in writing by October 3, 2008. On October 3, the Department filed its Motion to Continue. The petitioner is on record as vigorously opposing it.

SUMMARY OF DEPARTMENT'S EVIDENCE PRESENTED AT THE
SEPTEMBER 17, 2008 HEARING

1. The EMT testified that on June 2, 2005 she responded to a call at D.F.'s address regarding a "female struck by a vehicle".

2. When she arrived she found D.F., whom she described as "elderly", sitting in a chair, "hysterical".

3. D.F. alleged that "he did it deliberately". D.F. pointed to the petitioner, who was outside in his yard next door to D.F.'s house mowing his lawn.

4. D.F. alleged at the time, and in later interviews with the police and Department's investigators, that her injuries were caused when the petitioner had backed his car into her.

5. The EMT observed that D.F. had "abrasions" on her cheek and knee. She stated that she believed the injuries were consistent with being struck by a car with force. The EMT team then transported the petitioner to the hospital. She testified that D.F. lost consciousness on the way to the hospital.

6. The Department's investigator testified that based mostly on her interviews with D.F. she had concluded that the petitioner had deliberately struck D.F. with his car.

7. From the investigator's report it appears that the petitioner's son was the only other alleged "eyewitness". In her report, the investigator noted that in a brief phone conversation with the petitioner's son, which was terminated when the petitioner intervened, the son had told her that he was riding in the car that day and that D.F. had "appeared to be struck". The petitioner's son was present at the hearing, but the Department did not call him as a witness.

8. Other than D.F.'s allegations, there does not appear to be any other claim or witness that the petitioner knowingly or deliberately struck D.F. with his car. Thus, the Department's case appears to rest mainly, if not exclusively, on D.F.'s credibility.

DEPARTMENT'S MOTION TO CONTINUE

As noted above, the Department did not formally object to the prolonged continuances in this matter to allow the criminal matters against the petitioner to be resolved.⁴ Once those matters were resolved, the Board promptly scheduled the matter for hearing. The notice of hearing was mailed to both parties on August 1, 2008, forty-seven days in advance of the hearing date.

⁴ Had the petitioner been convicted it probably would have obviated any need for a hearing in this matter.

The Department's attorney represents that she was on vacation until August 18 (although she does not state when she left on vacation, or that she was unaware of the hearing date before she left on vacation). There is no claim or showing that another attorney or employee in her office couldn't have attempted to notify her of the impending hearing, or helped to prepare for the hearing in her absence. At any rate, the Department still had a full month after its attorney's return on August 18 to prepare for the hearing on September 16.

As noted above, the first notice to the petitioner or the Board regarding the Department's claim of lack of adequate preparation time was at the telephone status conference on September 9, a week before the hearing. In its written motion filed after the hearing the Department offered only the following elaboration as to the timing and extent of its efforts to have D.F. and its other witnesses present at the hearing:

Due to the inactive status of the appeal, the Department had not been in contact with D.F. since early 2008. Upon receipt of the hearing notice in mid-August, the Department began attempting to reach her to notify her about the hearing, without success, as noted during the September 9 status conference. Following the status conference, the Department was able to reach a friend of D.F. and through her to let D.F. know the Department was seeking to contact her. The communication with D.F. did

not occur until two days before the scheduled date of the fair hearing, at which point D.F. indicated that she would not be able to prepare for the hearing in such a short time due to her medical condition and emotional state. A statement from her medical provider confirming D.F.'s inability to appear on September 17 is attached as Exhibit A. Because of the statements of the hearing officer on September 9 regarding the availability of witnesses and because of the proximity to the date of the hearing by the time the Department was able to contact D.F., the Department did not attempt to subpoena D.F.

The Department has not offered any explanation as to *why* it was unable to contact D.F. until two days before the hearing, forty-five days after the notice of hearing was sent. The "medical statement" referred to above is dated September 29, 2008, almost two weeks *after* the date of the hearing. Because of its delay in contacting D.F., and D.F.'s pending surgery, the Department is now seeking a continuance until sometime in November, more than three months after the initial notice of hearing was sent, before D.F. will again be available to testify.

The Board cannot discern any allegation by the Department explaining or justifying its failure to timely prepare for hearing other than its own lack of due diligence and attention. The Department does not allege that once the notice of hearing was mailed on August 1, 2008 either the petitioner or the Board contributed to its inability to

contact its witnesses or to otherwise prepare its case for hearing by September 16. In a memo dated August 11 the hearing officer had ruled that no further continuances would be granted absent a showing of "substantial and unavoidable prejudice". The petitioner, having been denied his own previous motion for a continuance, was present and ready to proceed on September 16. In light of the above, it must be concluded that granting the Department a continuance as requested would be an extraordinary and unwarranted dispensation.⁵

ORDER

The Department's Motion to Continue is denied. The Department's decision substantiating the report of abuse in question is reversed.

REASONS

The Commissioner of the Department of Disabilities, Aging and Independent Living (DAIL) is required by statute to investigate allegations of abuse, neglect and exploitation of vulnerable adults, and to keep those records that are "substantiated" in a registry under the name of the person

⁵Were the circumstances reversed, it is inconceivable that the Department would agree to a continuance to accommodate this, or any other, petitioner in such a manner.

who committed the abuse. 33 V.S.A. §§ 6906 and 6911(b). If a report has been substantiated, the person who has been found to have committed abuse may apply to the Human Services Board for relief that the report is not substantiated. 33 V.S.A. § 6906(d). At these hearings the burden of proof is on the Department.

The statutes identified by the Department in its substantiation of "abuse" provide as follows, at 33 V.S.A. § 6902:

(1) "Abuse" means:

(A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to a vulnerable adult;

. . .

(E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of emotional distress;

This case, like many others of this nature, essentially boils down to the credibility of the alleged victim versus that of the petitioner. The Department, in its investigation and review of the matter chose to credit D.F.'s allegations.

While this may not have been unreasonable, in a *de novo* hearing the Department simply cannot prevail unless it establishes D.F.'s credibility through testimony and documents admissible under the Vermont Rules of Evidence. See *In re Bushey-Combs*, 160 Vt. 326 (1993); *In re C.M.*, 168 Vt. 389 (1998). Thus, unless it is granted a continuance to allow D.F. to testify at a later date, and D.F. is then found to be credible, the Department cannot meet its burden of proof in this matter. Therefore, the only real issue before the Board at this time is whether the Department should be granted a continuance for this purpose.

As noted above, at the hearing on September 16, 2008 the Department presented no admissible evidence establishing that the petitioner knowingly or willfully struck D.F. with his car, or that he ever inflicted emotional distress on her. For the reasons set forth above, the Department's request for a continuance is denied. Therefore, the Department's decision substantiating the reports of abuse in question must be reversed.

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